

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CLARENDON COUNTY
COURT OF COMMON PLEAS

The Honorable R. Ferrell Cothran, Jr. Circuit Court Judge

Case No. 2019-000516

Palmetto Air Plantation Homeowners Association, Inc. Respondent,

v.

Kim E. Bevier Appellant.

FINAL BRIEF OF RESPONDENT

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I. **STATEMENT OF ISSUE ON APPEAL**

**ARE RESTRICTIVE COVENANTS BINDING ON THE APPELLANT
IF THE RESTRICTIVE COVENANTS WERE NOT NOTICED IN
APPELLANT'S DEED EVEN THOUGH APPELLANT HAD
ACTUAL AND CONSTRUCTIVE NOTICE OF THE
RESTRICTIVE COVENANTS?**

STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint in the Court of Common Pleas for Clarendon County on April 17, 2017 (R. pp. 18-22). Along with the Complaint, the Respondent sought injunctive relief by filing a Motion for a Temporary Restraining Order on April 18, 2017 (R. pp. 39-40). On June 6, 2017, The Honorable R. Ferrell Cothran, Jr. granted the Respondent's request for a Temporary Restraining Order (R. pp. 15-16).

The Appellant filed his Answer to the original Complaint on June 16, 2017. By agreement the Respondent filed an Amended Summons and Complaint on June 28, 2017 (R. pp. 24-30). The Appellant filed his Answer to the Amended Summons and Complaint on July 7, 2017 (R. pp. 31-33). Over three months later, the Appellant filed a Motion to Amend his Amended Answer (R. pp. 43). A hearing was held on March 20, 2018 in which the Court granted Appellant's Motion to Amend his Amended Answer (R. p. 17). On March 22, 2018, the Appellant filed his Second Amended Answer and Counterclaim (R. pp. 34-38).

On July 19, 2018, the Respondent filed a Motion for Partial Summary Judgment

and Memorandum in support (R. pp. 44-56). The parties agreed to a stipulation of facts on August 21, 2018 and agreed that the Motion for Partial Summary Judgment would be heard without oral argument (R. pp. 113-115). The Appellant filed his memorandum in opposition to the Motion for Partial Summary Judgment on August 25, 2018. The Court then filed its Order granting Respondent's Motion for Summary Judgment (R. pp. 3-11). The Appellant then filed a Motion to Reconsider that was denied by the Court on February 28, 2019. This Appeal followed.

STATEMENT OF FACTS

The Respondent would show that on or about July 11, 2001 the property in question became subject to "Declaration of Covenants, Conditions and Restrictions Palmetto Air Plantation Clarendon County, South Carolina" (hereinafter "Covenants"). Said Covenants were filed in the Clarendon County Courthouse in Deed Book A435 at page 223 on or about July 11, 2001 (R. pp. 24-33, pp.34-38, and pp. 176-196). The Appellant, Kim S. Bevier, purchased two lots within Palmetto Air Plantation on September 26, 2003. Said lots are subject to the aforementioned Covenants. The Appellant in Paragraph 4 of his Second Amended Answer to Amended Complaint states the following: "Paragraph five is admitted to the extent it alleges that the Declaration of Covenants, Conditions and Restrictions Palmetto Air Plantation Clarendon County, South Carolina were filed as alleged and that the Appellant purchased two lots as alleged. The allegation that the lots are subject to the alleged covenants is denied" (R. pp 34-36).

On May 21, 2003, prior to signing the contract of sale, W.C. Coffey, Jr., Esquire wrote a letter to the Appellant and his now deceased wife. In the letter, Mr. Coffey references the two lots (Lots 33 & 34) that were later purchased by the Appellant (R. p. 197). Mr. Coffey further references a meeting between himself, the Appellant and his late wife wherein the three met. Mr. Coffey specifically mentions: "It is obvious that you have considered this carefully and I appreciate your questions regarding the Restrictive Covenants" (R. p. 197).

The Appellant and Respondent entered into a contract of sale for two lots on May 23, 2003 (R. pp. 198-201). The contract of sale was signed by Kim Bevier and his wife on May 23, 2003. Page two paragraph 4 is captioned "Restrictive Covenants" and states: "This property is subject to all visible and recorded easements, right-of-way, and covenants, including those Restrictive Covenants dated 11 July 2001 recorded in the office of RMC for Clarendon County in Deed Book A-444 at Page 26" (R. pp. 199).

At closing, a Preliminary Attorney's Title Certificate provided to Mr. & Mrs. Bevier on September 25, 2003. Said certificate states in paragraph 3 the following: "Restrictive Covenants recorded in the office of the Clerk of Court for Clarendon County in Deed Book A-444 at Page 26 and Deed Book A-435 at 223." (R. pp. 204-205).

On October 24, 2003, the Final Attorney's Title Certificate was mailed to the Appellant. It States in paragraph 3 the following: Restrictive Covenants recorded in the office of the Clerk of Court for Clarendon County in Deed Book A-444 at Page 26 and Deed Book A-435 at 223" (R. pp. 207-208).

During the April 4, 2018 deposition of the Appellant , the following exchange took place between the Respondent 's attorney and the Appellant:

Q. All right. So, let's go back to your contention that the Covenants—I want to get a clear understanding from you why the Covenants don't---aren't applicable to you.”

A. Because they never been bound to the property that I purchased.

Q. All right. Explain that to me because I'm having a hard time with your understanding of the law.

A. okay. My lay understanding of this is that any Restrictive Covenants need to be either stipulated in a conveyance or referenced in a conveyance if recorded elsewhere. None of those things happened when Joe sold all the land as Mid Eastern Truck Wash sold all land to Palmetto Air Plantation, LLC. Okay?

A. All right. Joe at that point in time, lost his rights as Declarant because more than twenty-five (25) – he retained zero percent of the lots at that time. He can't act as a declarant after he sold all of the property. (R. p 168, lines 5-25).

A. So you ask---why I don't believe the covenants apply to my land---that's the first reason is that he lost all right to be Declarant and God on that property after he sold it to Palmetto Air Plantation, LLC. Palmetto Air Plantation, LLC gave me a general Warranty Deed: Okay? Not subject--I guess it's subject to restrictions, zoning, easements and all that jazz that apply, but it did again, it did not bind the covenants to my property and, indeed I don't think they could unless they refiled themselves . (R. p. 169, lines 13-25).

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt, Co., Inc.*, 381 S.C. 326, 329-30, 673 S.B.2d 801, 802 (2009). “At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” *S.C. Prop. & Cas. Guar Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct App. 2001). “The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.” *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548,558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact *Id.* Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* at 558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. *Id.* at 559, 671 S.E.2d at 85.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT BECAUSE THE APPELLANT HAD ACTUAL AND CONSTRUCTIVE NOTICE OF THE RESTRICTIVE COVENANTS.

Restrictive covenants differ from contracts in that they “run with the land,” meaning that they are enforceable by and against later grantees. 17 S.C. Jur. *Covenants* § 18 (2005). Restrictive covenants that require grantees to pay assessments for the upkeep of a particular parcel of property are held to be real covenants which “touch and concern” land, and therefore, run with the land. *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. *Covenants* §§ 18 and 19.

There are several ways in which restrictive covenants may be created. The most common means are: (1) by deed; (2) by declaration; and (3) by implication from a general plan or scheme of development. 17 S.C. Jur. *Covenants* § 60. The initial restrictive covenants applicable to the Appellant were created by the Declaration of Covenants when MidEastern Truck Wash, Inc. (Declarant) executed and recorded the Declaration of Covenants, Conditions and Restrictions Palmetto Air Plantation Clarendon County, South Carolina recorded at Deed Book A435 at page 223 on or about July 11, 2001 (R. pp 176-196). See *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct.App.1994); 17 S.C. Jur. *Covenants* § 8. Restrictive covenants will be enforced unless they are indefinite or contravene public policy. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987).

The Covenants here were filed in the Clarendon County RMC Office in Deed Book A435 at page 223 on or about July 11, 2001 (R. pp. 176-196). (See also Amended Complaint and Second Amended Answer wherein it was alleged and admitted by the Appellant that the Covenants were filed. See also, filed copy of the Covenants at Exhibit 2 of the Appellant's April 4, 2018 deposition (R. pp. 24-33, pp 34-38, and pp. 176-196)).

This exact issue (e.g. whether or not restrictive covenants were binding on a purchaser regardless of whether or not the covenants were actually noticed in the deed) was before the Court of Appeals in *Harbison Community Ass'n, Inc. v. Mueller* 459 S.E.2d 860 (Ct. App. 1995). In that case the Court Appeals stated the following:

The circuit court also reversed the magistrate because the Declaration's fee assessment provisions were not recited in the Muellers' deed, and therefore the Muellers were not bound by them. **This was an error. A covenant is enforceable against a subsequent grantee, even if not in the grantee's deed, if the grantee has actual or constructive notice of the covenant. 20 Am.Jur.2d Covenants, Conditions, and Restrictions § 26 (1965). A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title. Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975). The Declaration was recorded and noted in the J.C. Roy Company deed, within the Muellers' chain of title. Thus, the Muellers had constructive notice of the Declaration. Moreover, Mr. Mueller testified he had actual notice of the Declaration. Accordingly, the Muellers are bound by the terms of the Declaration, and the circuit court erred, as a matter of law, in finding the Muellers not bound by the covenant because it was not in their deed (emphasis added).**

In this case, the Appellant, had constructive notice of the Covenants by virtue of the fact that the Covenants were filed before the purchase of the Appellant's lots in Deed Book A435 at page 223 on or about July 11, 2001 (See Amended Complaint and Second

Amended Answer wherein it was alleged and admitted by the Appellant that the Covenants were filed and See also, filed copy of the Covenants at Exhibit 2 of the Appellant's April 4, 2018 deposition (R. pp. 24-33, pp 34-38, and pp. 176-196)).

The Appellant also had actual notice of the Covenants by virtue of the following: On May 21, 2003, prior to signing the contract of sale, W.C. Coffey, Jr., Esquire wrote a letter to the Appellant and his now deceased wife. In the letter, Mr. Coffey references the two lots (Lots 33 & 34) that were later purchased by the Appellant. Mr. Coffey further references a meeting between himself, the Appellant and his late wife wherein the three met. Mr. Coffey specifically mentions: "It is obvious that you have considered this carefully and I appreciate your questions regarding the Restrictive Covenants" (See Exhibit 1 to the April 4, 2018 deposition of the Appellant (R. p. 197)).


The Appellant and Respondent entered into a contract of sale for two lots on May 23, 2003 (See Exhibit 4 to the April 4, 2018 deposition of the Appellant (R. pp. 198-202)). The Contract of sale signed by Kim Bevier and his wife on May 23, 2003. Page paragraph 4 is captioned "Restrictive Covenants" and states: "This property is subject to all visible and recorded easements, right-of-way, and covenants, including those Restrictive Covenants dated 11 July 2001 recorded in the office of RMC for Clarendon County in Deed Book A-444 at Page 26" (R. p. 199). At closing, a Preliminary Attorney's Title Certificate was provided to Mr. & Mrs. Bevier on September 25, 2003. Said certificate states in paragraph 3 the following: "Restrictive Covenants recorded in the office of the Clerk of Court for Clarendon County in Deed Book A-444 at Page 26 and Deed Book A-435 at 223." (R. pp.204). On October 24, 2003 R. pp 204-205). The Final

Attorney's Title Certificate was mailed to the Appellant (R. p. 206). It States in paragraph 3 the following: "Restrictive Covenants recorded in the office of the Clerk of Court for Clarendon County in Deed Book A-444 at Page 26 and Deed Book A-435 at 223" (R. p. 207).

CONCLUSION

The Respondent would show that the Appellant had actual and constructive knowledge of the Covenants and would ask this Court to affirm partial summary judgment as to the Appellant's contention that the Covenants do not "run" with the lots he purchased because the Covenants were not recited in his deed when he purchased the property from Palmetto Air Plantation, LLC.

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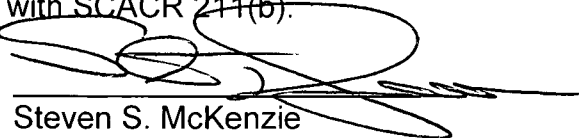
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Kim E. Bevier.....Appellant.

CERTIFICATE OF COMPLIANCE WITH SCACR 211(b)

The Respondent certifies that the Final Brief complies with SCACR 211(b).



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